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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 347

MAX JABEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

MORRIS A. SHENKER,
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MAX JABEN,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered June 16, 1964.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix, infra) is not yet reported. Two relevant opinions of the District Court are published, **United States v. Jaben**, 225 F. Supp. 47 (W. D. Mo. 1963); **United States v. Jaben**, 226 F. Supp. 757 (W. D. Mo. 1963).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 16, 1964, affirming petitioner's conviction entered on his plea of *nolo contendere* to a violation of Title 26, U. S. C., § 7201. Petitioner's motion for rehearing was denied on July 9, 1964. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

1. Do Rules 3 and 4 of the Federal Rules of Criminal Procedure, construed in light of the Fourth Amendment to the Federal Constitution, permit the Commissioner to issue a complaint and summons in a tax evasion case thereby tolling the six year statute of limitations, Title 26, U. S. C., § 6531, where such complaint and summons is issued solely on the basis of a form affidavit with blanks filled in, executed by a Special Agent of the Internal Revenue Service, adopted by the Justice Department for use in tax evasion cases, wherein *pro forma* the agent avers that he has personal knowledge that taxes were evaded by reason of his having interviewed unnamed persons allegedly doing business with the taxpayer "and having knowledge of said taxpayer's financial condition", and his having examined unspecified public and private documents "reflecting the said taxpayer's income"; where in addition to containing said *pro forma* allegations, there is no basis alleged for crediting the veracity of the unnamed persons and unspecified documents, and there is no basis averred for establishing which statements are based on the agent's personal knowledge and which are based on hearsay?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. The Fourth Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

2. Title 26, U. S. C., § 6531, provides in pertinent part, as follows:

> "No person shall be prosecuted, tried or punished for any of the various offenses arising under the Internal Revenue laws unless the indictment is found or the information is instituted within 3 years, next after commission of the offense, except that the period of limitation shall be 6 years . . . "
>
> "(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;"
>
> . . . . . .
>
> ". . . Where a complaint is instituted before a commissioner of the United States within the period above limited the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States . . ."

3. Rule 3 of the Federal Rules of Criminal Procedure provides:

> "Rule 3. The Complaint
>
> The complaint is a written statement of the essential facts constituting the offense charged. It shall

be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

4. Rule 4 of the Federal Rules of Criminal Procedure provides in pertinent part, as follows:

"Rule 4. Warrant or Summons upon Complaint

(a) **Issuance.** If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the Government a summons instead of a warrant shall issue. . . ."

STATEMENT.

Petitioner was indicted on a three count indictment; Count I of the indictment charges tax evasion for the year 1956 by the filing of a false return on April 16, 1957. The indictment was returned on May 17, 1963, more than six years after the return was alleged to have been filed (R. 1). By appropriate motions, appellant moved to dismiss Count I on the grounds that it was barred by the statute of limitations (R. 11, 95, 99). A hearing was held on August 6, 1963 (T. 3-42). The Court held that the complaint (R. 9-10) filed April 15, 1963 tolled the statute of limitations (R. 82, 111-114).

At the hearing on August 6, 1963, Lee E. Cisel, Commissioner for the Western District of Missouri at Kansas City, testified in behalf of appellant (T. 3-14). He testified that on April 15, 1963 he issued a summons for appellant based upon a complaint filed with him on that date (T. 3). The complaint reads as follows:

"The undersigned complainant, being duly sworn, states:

That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956, and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of said taxpayer's financial condition.

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, Max Jaben did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue of the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,569.99."

Mr. David Thompson, a Special Agent for the Internal Revenue Service accompanied by Mr. Featherstone of the Justice Department, came into Commissioner Cisel's office on April 15, 1963 with the complaint. He read the complaint which was signed by Thompson, found it sufficient

and signed his name to the summons. Thereafter, he certified a copy of the complaint and gave it to Mr. Thompson or Mr. Featherstone to be taken to the Marshal's office. That was all that took place at that time (T. 12-13). Thereafter, at the request of the United States Attorney, no further proceedings were conducted by the Commissioner (R. 7).

After all motions to dismiss were overruled, appellant applied to the Eighth Circuit for a writ of prohibition, or in the alternative for mandamus or certiorari, to prevent further proceedings on Count I. This petition was overruled without prejudice to the bringing of the instant appeal, Jaben v. Duncan, Misc. No. 226 (8th Cir., 1963). (The Court's order is not published.)

Thereafter, on December 2, 1963, through his counsel, appellant entered his plea of *nolo contendere* to the facts of Count I of the indictment, specifically reserving the right to appeal on the question of whether or not the count is barred by the statute of limitations (R. 125-126). The district court accepted appellant's plea and on January 7, 1964, sentenced appellant to a term of two years, four months of which sentence was to be served; appellant was placed on probation for the remaining twenty months (R. 135). The two remaining counts were dismissed by the government. On January 15, 1964, appellant appealed to the Eighth Circuit from the judgment of conviction and foregoing sentence (R. 136).

In the Eighth Circuit, appellant urged that the only issue was whether or not the complaint based on the affidavit satisfied the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure construed in light of the Fourth Amendment to the Federal Constitution; if the complaint were valid the statute of limitations, Title 26, U. S. C., § 6531, was tolled and the judgment should be affirmed: otherwise, if the complaint were invalid the

statute was not tolled and the judgment should be reversed. Both the Government and the Eighth Circuit accepted this premise (App. 4). Accordingly, the only issue in the case was the validity of the complaint.

Appellant relied primarily on the case of **Greenberg v. United States**, 320 F. 2d 467 (9th Cir., 1963), a case involving a virtually identical complaint which was declared invalid and incapable of tolling the statute of limitations by the Ninth Circuit based on this Court's decision in **Giordenello v. United States**, 357 U. S. 480 (1958). Appellant cited this Court's language in **Giordenello**, relied upon by the Ninth Circuit:

> "The protection afforded by these Rules [Rules 3 and 4, Fed. Rules Crim. Proc.] when they are viewed against their constitutioned background, is that the inferences from the facts which lead to the complaint '* * *' be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' * * *. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.
>
> "When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with

personal knowledge of the matters contained therein; it does not set forth any other sufficient basis upon which a finding of probable cause could be made * * * 375 U. S. at p. 486 (Emphasis supplied)."

It was urged that the instant complaint similarly failed to "pass muster," because the complaint on its face established the absence of personal knowledge and there were no facts alleged which would demonstrate personal knowledge.

Appellant also cited to the Circuit Court of Appeals this Court's decision in **Jones v. United States**, 362 U. S. 257 (1960), urging that since **Giordenello** applied the same criteria to arrest warrants as to search warrants the case was directly in point. Appellant further urged that since the affidavit herein was based on hearsay, i. e., information obtained from unnamed persons and unspecified documents, and that since there was no basis for crediting the hearsay the affidavit was invalid in light of **Jones**, supra.

Finally, appellant relied upon the case of **Ventresca v. United States**, 324 F. 2d 864 (1st Cir. 1963), certiorari granted, U. S. (1964). It was urged that although the affidavit herein alleged the complainant had personal knowledge, on its face the affidavit showed that at least some of his information was hearsay, and therefore the affidavit was insufficient for failing to designate which statements were based on hearsay and which were based on personal knowledge.

The Government relied principally on the cases of **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963); and **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963), all of which cases held that form complaints virtually identical to that involved in the instant

case were sufficient to toll the statute of limitations. The **Black** case is worth special mention for the reason that it arose out of the same district as the instant case; accordingly, the same commissioner, Mr. Cisel, was involved.

The Eighth Circuit and the government made no effort to distinguish **Greenberg**, supra. The Court held that "beyond cavil" the **Greenberg** case supported appellant's position (App. 5). Rejecting the Ninth Circuit's opinion and relying on its own interpretation of **Giordenello**, supra, however, the Court held the complaint sufficient, relying upon **Sanseverino**, supra, **Black**, supra and **Scheetz**, supra. Thus, this case is one where there is a clear and undeniable conflict between the decision in the instant case and the decision of the Ninth Circuit in **Greenberg**, supra.

In the motion for rehearing, petitioner called the Circuit Court's attention to the case of **Aguilar v. Texas**, 375 U. S. 812 (1964), which had been decided the day prior to the Eighth Circuit's opinion. In **Aguilar**, this Court reaffirmed that the same standards of probable cause apply to arrest warrants as well as to search warrants and that **Jones** as well as **Giordenello** must be considered by the court. Petitioner also pointed out that this Court articulated the requirement that the commissioner be informed of the "underlying circumstances" from which the officer concluded the informant was "credible" or his information "reliable." It was urged, therefore, that as here the Commissioner was looking at a form affidavit almost identical to that he had already seen in **United States v. Black**, supra, he could not possibly be informed of the "underlying circumstances;" therefore, the affidavit was insufficient in light of **Aguilar**, **Jones** and **Giordenello**. The motion for rehearing was denied on July 9, 1964, without opinion.

REASONS FOR GRANTING THE WRIT.

1. The Government uses the form complaint involved herein in many tax evasion cases, and accordingly, the conflict of authorities should be resolved not only to avoid the anomaly of one man's freedom depending upon whether he is tried in the Ninth Circuit as opposed to the Eighth or Tenth, but also to resolve a question which will surely arise again in other circuits.

As pointed out previously, there is a clear and undeniable conflict between the decision herein and the decision in **Greenberg**, supra. We think it is important to resolve this conflict because the government makes frequent use of the complaint herein in tax evasion cases.

The Department of Justice has long adhered to the use of *pro forma* complaints in tax cases. Earlier forms were sometimes held invalid **United States v. Langsdale**, 115 F. Supp. 489 (W. D. Mo. 1953) (a decision by Judge Duncan who coincidentally presided in the instant case); **United States v. Freeman**, 165 F. Supp. 121 (D. C. S. D. Ind. 1958). Other decisions upheld the form complaint. **United States v. DeHardit**, 120 F. Supp. 110 (E. D. Va.), affirmed 224 F. 2d 673 (4th Cir. 1955). This Court's decision in **Giordenello**, supra, caused the Justice Department to abandon its older form in favor of the form employed in the instant case, and in **Greenberg**, supra, **Black**, supra, **Scheetz**, supra and **Sanseverino**, supra (Gov. Br. 18). From the above cases, it is evident that the form complaint herein is in use in the Seventh, Eighth, Ninth and Tenth Circuits. We have no personal knowledge that the same form is in use in the other circuits (although this seems probable) and accordingly, we call upon the Government in their reply brief to inform this Court of the exact nature and extent of the usage of this

form in tax evasion cases throughout the country. We suspect that the Government's brief will disclose that the form is in general use throughout the country, and is used in almost all cases where a complaint is filed in an attempt to toll the statute of limitations.

It is difficult to understand why with a six year statute of limitations the Government insists on waiting until almost the last day (and sometimes until the last minute of the last day) before instituting criminal proceedings. It has been our experience, however, and the experience of other practitioners, that more often than not the Government does wait until the last minute to file a complaint in a tax case. See, e. g., **Burger v. United States**, 262 F. 2d 946 (8th Cir. 1959); **Zacher v. United States**, 227 F. 2d 219 (8th Cir. 1955).

We tried unavailingly to challenge the Government's dilatory tactics in tax cases as a deprivation of the right to a speedy trial. **Foley v. United States**, 290 F. 2d 562 (8th Cir.), cert. denied, 368 U. S. 888 (1961). That such delay is almost a universal practice by the Government is amply demonstrated by **Greenberg**, supra, **Black**, supra, **Scheetz**, supra, **Sanseverino**, supra, and the instant case.

The foregoing inevitably points to the conclusion that the question which has already arisen in the Seventh, Eighth, Ninth and Tenth Circuit with a conflict between the Ninth Circuit on the one hand and the Eighth and Tenth on the other, will certainly arise again in other circuits. To avoid confusion in the law engendered by conflicts in decisions among the circuits, this Court has traditionally granted certiorari. In view of the importance of the question, its immediacy and universal application, it would seem incumbent that the law be settled.

Furthermore, in view of the abundance of recent cases turning upon the question involved here, the question is ripe for decision at this time.

2. The use by the Government of a form complaint as a "short cut" around the requirements of the Fourth Amendment raises serious questions in the administration of justice.

The form complaint used by the Government herein is as follows:

"The undersigned complainant, being duly sworn, states:

"That he is a Special Agent for the Internal Revenue Service, and, in the performance of the duties imposed on him by law, he conducted an investigation of the Federal income tax liability of (name of taxpayer) for the calendar year ..... by examining the said taxpayer's tax return for the calendar year ..... and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons, having knowledge of the said taxpayer's financial condition."

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the ..... day of ....., 19.., at (city), (State), in the District of (State), (name of taxpayer) did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year ....., by filing and causing to be filed with the District Director of Internal Revenue for the District of ....., (city), (state), at (city), (state), a false and fraudulent income tax return, wherein he stated his taxable income for the calendar year ..... was (income shown on tax return) and the amount due and owing for thereon was the sum of (amount of tax due as shown on return), when in fact, his taxable income

for the calendar year was the sum of ..... upon which said taxable income he owed to the United States of America an income tax of .....

(Signed) .....

Special Agent, Internal Revenue Service

.....

(City) (State)

It is clear from the foregoing form that all blanks, save one, can be filled by obtaining the information directly from the taxpayer's tax return at the office of the Internal Revenue Service. The remaining blank is the one wherein the amount of the true taxable income, according to the Special Agent, is filled in. Thus, the whole affidavit boils down to the Special Agent's unsupported conclusion that the taxpayer's actual income, as opposed to his reported income, was a certain number of dollars.[1] And this conclusion is the only basis on which the Commissioner could base his finding of probable cause.

It is, to say the least, difficult (and we think impossible) to square the usage of form complaints with the require-

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[1] Actually, the Special Agent's conclusion that the true taxable income is a certain amount is meaningless. It is universally held that the Government is not required to prove that the true taxable income is that alleged in the indictment. It need only prove that the actual income was substantially in excess of that reported and that, therefore, a substantial amount of taxes was evaded. See, e.g., *Leeby v. United States*, 192 F. 2d 331, 334 (8th Cir. 1951); *United States v. Johnson*, 319 U. S. 503 (1943). Thus, the effect of the affidavit would not be altered if instead of stating the amount of actual income the affidavit read:

> ". . . wherein he stated that his taxable income for the year ..... was ....., and that the amount due and owing thereon was the sum of ....., when in fact his taxable income for the said calendar was [substantially in excess of the amount reported] and upon said taxable income he owed to the United States of America an income tax [substantially in excess of the amount of .....]"

With this slight modification, the blanks could be filled in using only the records on file within the Internal Revenue Service without changing the legal effect of the affidavit.

ment of **Jones**, supra, that there be substantial basis alleged in the affidavit for crediting the information supplied by unnamed persons. Similarly, the usage of form complaints does not satisfy the requirements of **Aguilar**, supra, that the magistrate be informed of the "underlying circumstances" from which the officer concluded these persons were reliable;" and finally, this form complaint could not satisfy the purpose of a complaint, as set out in **Giordenello**, loc. cit., supra:

> "The purpose of the complaint . . . is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists."

It is difficult to see how we could say with the above form complaint that the "inferences from the facts which [led] to the complaint . . . [were] drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Granted that the purpose of the complaint is to supply the commissioner with facts from which he could draw the inference of probable cause, a form complaint would seem defeating of this purpose. The Government has drafted a form which is so universal in its application that it is probably literally true even when viewed in light of the myriad possibilities of tax evasion. By being so universally applicable, it is robbed of its sole function—it does not supply facts from which a commissioner can find probable cause.

Furthermore, the implications stemming from the sanctioned use of form affidavit are staggering. If a form complaint is appropriate with respect to complaint, it would be appropriate with respect to search warrants. Certainly, if the Government could reduce the multitude of fact situations to generalized forms (which we think it

will admit it is attempting to do), the situations where a person goes free because the "constable blundered" would be reduced. But, what would happen to the Fourth Amendment? We think it would be reduced to a game of finding and filling in the appropriate form. Further, the more universal the applicability of the form, the less likely it is to supply the necessary facts to the commissioner.

The instant case is a good example of how form complaints can be abused. The Special Agent was asked what he meant by "private records reflecting the said taxpayer's income". He showed a total lack of comprehension to the term used in the complaint sworn to by him (T. 16-18). Yet, the Commissioner by mere examination of the complaint found it sufficient (T. 12). If certiorari were granted, we would contend that the filing of a form complaint with the blanks filled in, coupled with the "rubber stamp" approval of the Commissioner, could not possibly satisfy the Fourth Amendment. In any event, there is a serious question raised as to whether justice can be administered by rote.

3. **At the previous term this Court decided a case involving an affidavit for a search warrant, Aguilar v. Texas, 375 U. S. 812 (1964); the Court has granted certiorari in the case of Ventresca v. United States, 324 F. 2d 864 (1st Cir. 1963), a case relied upon by appellant in the Eighth Circuit; since the instant case can be disposed of on the same basis as the Ventresca case; and since the instant case involves a complaint rather than a search warrant, a decision herein will serve nicely to round out the law in an area in which this Court has presently shown a great interest.**

This Court, subsequent to the date of the opinion by the Eighth Circuit herein, granted certiorari in the case

of **Ventresca v. United States**, 324 F. 2d 864 (1st Cir. 1963) certiorari granted, U. S., a case strongly relied upon by appellant in the Eighth Circuit. The question upon which this Court granted certiorari is the question of whether when the statements in an affidavit are based in part on personal knowledge and in part on hearsay, whether the affidavit must clearly show which statements are based on personal knowledge and which are based on hearsay. It was urged unavailingly in the Eighth Circuit that once the affidavit claimed personal knowledge whereas the remainder of the affidavit showed that at least in part it was based on hearsay, there being no delineation between the hearsay and the personal knowledge, the complaint was invalid in light of **Ventresca**, supra. It is submitted that in view of the fact that this Court thought the question to be of sufficient importance to justify certiorari in **Ventresca**, supra, it is also important enough to justify certiorari herein, especially in view of the conflict of the decisions of the Circuits on the validity of the complaint herein.

In addition to granting certiorari in **Ventresca**, supra, at the October, 1963, term, this Court decided the case of **Aguilar v. Texas**, 375 U. S. 812 (1964), building upon the line of cases defining the requirements for search warrants and complaints, culminating with **Jones**, supra, and **Giordenello**, supra. In addition, this Court has granted certiorari in **Stanford v. Texas**, certiorari granted, U. S., which also involves the validity of a search warrant. We think a decision in the instant case, which involves the validity of complaint rather than a search warrant, especially in view of the conflict among the circuits, would serve nicely to round out the law in this area.

CONCLUSION.

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 17,566.

Max Jaben, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[June 16, 1964.]

Before Vogel, Matthes and Ridge, Circuit Judges.

Matthes, Circuit Judge.

Max Jaben (hereinafter called "appellant") tendered a plea of nolo contendere to Count I of an indictment charging him with attempted evasion of income tax for the year 1956. The plea was accepted by the court (Judge Duncan), and thereafter judgment of conviction was entered. The indictment was filed on May 17, 1963, more than six years after the offense alleged in Count I had been committed (April 16, 1957); however, the complaint upon which the summons was issued was filed on April 15,

1963, and within the limitation period.[1] This appeal presents the sole question whether the offense is barred by the statute of limitations. In order to resolve this issue, we must scrutinize the complaint and determine whether it was sufficient to enable the United States Commissioner to ascertain that probable cause existed within the rationale and teachings of the Supreme Court in **Giordenello v. United States**, 357 U. S. 480 (1958), and consequently whether it was sufficient to toll the statute of limitations.

A summary of the facts, all undisputed, will serve to place the issue in proper perspective.

On April 15, 1963, David A. Thompson, Special Agent of the Internal Revenue Service, signed, swore to and filed the complaint around which the controversy is centered. Because of its importance, the complaint is set out in full in the margin under footnote 2.[2] The United States Com-

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[1] 26 U. S. C., § 6531, relating to periods of limitation on criminal prosecutions, provides in pertinent part that the period of limitation for prosecution for the offense of wilfully attempting in any manner to evade or defeat payment of any tax, is six years. This section further provides that, "Where a complaint is instituted before a commissioner of the United States within the period above limited [six years], the time shall be extended until the date which is 9 months after the date of the making of the complaint * * *."

Under the 1939 Code, § 3748 (a), apparently applicable in *Zacher v. United States*, 8 Cir., 227 F. 2d 219, 224-225 (1955), cert. denied, 350 U. S. 993 (1956), and *Burger v. United States*, 8 Cir., 262 F. 2d 946, 953 (1959), cert. denied, 359 U. S. 990 (1959), the period of limitation was extended "until the discharge of the grand jury at its next session within the district." For analysis of 26 U. S. C., § 6531 and the amendment, see 1954 U. S. Code, Cong. & Adm. News, pp. 4564, 5236.

[2] "The undersigned complainant, being duly sworn, states:

"That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did bus-

missioner determined from the complaint that probable cause existed and thereupon issued a summons directing appellant to appear before the Commissioner on May 15, 1963. On May 17, an indictment in three counts was filed in the United States District Court alleging that appellant had attempted to evade payment of income taxes for the years 1956, 1957 and 1958 by filing false and fraudulent income tax returns for those years on April 16, 1957, April 15, 1958, and July 13, 1959, respectively.

On July 2, appellant filed a motion to dismiss the indictment, specifically alleging as to Count I that the offense therein charged was barred by the six-year statute of limitations, and that the statute was not tolled by the complaint filed on April 15. After a hearing, the court on September 4 denied the motion. **United States v. Jaben**, W. D. Mo., 225 F. Supp. 47 (1963). Thereafter, on November 1, appellant filed a supplemental motion to dismiss the indictment—again most strenuously attacking Count I, apparently because of the Ninth Circuit's opinion in

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iness; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfuly and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

(Signed) David A. Thompson
DAVID A. THOMPSON,
Special Agent,
Internal Revenue Service,
Kansas City, Missouri."

United States v. Greenberg, 320 F. 2d 467 (1963). This motion was denied on November 8. **United States v. Jaben**, W. D. Mo., 226 F. Supp. 757 (1963).

On December 2, the plea of nolo contendere to Count I of the indictment was tendered by appellant and accepted by the court. Counts II and III of the indictment were dismissed, and on January 7, 1964, judgment was entered on appellant's plea. Appellant was sentenced to imprisonment for a term of two years, but execution of all but four months of the sentence was suspended, and appellant was placed on probation for twenty months. This appeal is from the judgment of conviction on the plea.

We note initially that the question whether the offense is barred, a question appropriately raised by the motions to dismiss, is not foreclosed by the plea of nolo contendere. Appellant has the right to appeal from the judgment entered on the plea and to secure an adjudication of the question by this court. **Melrose Distillers, Inc. v. United States**, 4 Cir., 258 F. 2d 726, 727 (1958), affirmed 359 U. S. 271 (1959). Compare also, **Lott v. United States**, 367 U. S. 421 (1961).

Appellant concedes that the complaint was filed within six years after the alleged offense was committed and recognizes that if the complaint is legally sufficient the indictment, even though filed after the limitation period, is timely and supports the judgment of conviction. Conversely, the Government concedes that if the complaint is legally defective, the statute was not tolled by the filing thereof and the prosecution is barred. No other conclusion is permissible in view of 26 U. S. C., § 6531, and prior adjudications by this court. **Burger v. United States**, supra, 262 F. 2d 946; **Zacher v. United States**, 227 F. 2d 219.

Buttressed by the holding in **United States v. Greenberg**, supra, 320 F. 2d 467, appellant's position, in summary, is

that the challenged complaint is invalid on its face, in that it is vague, indefinite, is *pro forma*, and merely states the conclusion of the affiant; that it is based upon hearsay and no basis is alleged for crediting the hearsay; and that since no facts are alleged showing probable cause to believe that appellant committed the offense charged, the issuance of the summons violated the probable cause requirement of the Fourth Amendment to the United States Constitution and Rules 3 and 4, Fed. R. Crim. P.[3]

Beyond cavil, **Greenberg**, supra, 320 F. 2d 467, which struck down an almost identical complaint, supports appellant's position. However, that holding is not binding upon us, and with all due deference, we are not inclined—for what we regard to be impelling and cogent reasons—to follow that case.

Unquestionably, and as recognized by appellant and the Government, the controlling authority is **Giordenello v. United States**, supra, 357 U. S. 480. The parties differ, however, in their interpretation of the test which **Giordenello** established for determining whether the complaint satisfies the probable cause requirement.

It is well to have in mind that in **Giordenello** the pertinent part of the complaint read:

> "'The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas,

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[3] Rule 3, Fed. R. Crim. P., provides: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4 provides in pertinent part that if it appears from the complaint that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant shall issue; or upon the request of the attorney for the Government, a summons instead of a warrant shall issue.

Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.' " 357 U. S. at 481.

The crux of the holding in **Giordenello** on the issue before us is articulated as follows at pp. 485-486 of the opinion:

"Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it. . . . ' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized,' of course applies to arrest as well as search warrants. See **Ex parte Burford**, 3 Cranch. 448; **McGrain v. Daugherty**, 273 U. S. 135, 154-157. The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' **Johnson v. United States**, 333 U. S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's

mere conclusion that the person whose arrest is sought has committed a crime.

"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

Unlike **Giordenello**, here the complainant (Agent Thompson) stated under oath that he had personally investigated the tax liability of appellant; he set forth the nature of that investigation and stated that based upon the investigation he had "personal knowledge" that appellant had committed the offense which formed the basis of Count I of the indictment. In our view, the complaint does "pass muster" because it does provide a basis for the Commissioner's determination of the existence of probable cause.

Complaints substantially identical to the one under consideration were held invulnerable to the same attack appellant advances by at least two other district courts, **United States v. Black**, W. D. Mo., 216 F. Supp. 645 (1963) (Judge Oliver), and **United States v. Scheetz**, S. D. Ind., 224 F. Supp. 789 (1963) (Chief Judge Steckler).

Additionally, the identical question was raised before the Tenth Circuit in **Sanseverino v. United States**, 321 F. 2d 714 (1963).[4] There, the appellant had urged that,

[4] Appellant admits that the briefs in *Sanseverino* (provided to this Court by appellant) contain some discussion of the question before us. However, appellant discounts *Sanseverino's* applicability claiming that there no challenge to the complaint was made in the

"The complaint was not sufficient to toll the statute for the further reason that it does not show the matters were in the personal knowledge of the affiant and no showing that testimony was taken." In response, the Government, after an extended discussion of **United States v. Freeman**, S. D. Ind., 165 F. Supp. 121 (1958), and **Giordenello v. United States**, supra, 357 U. S. 480, stated:

> "The complaint fully meets the test set forth in **Giordenello** in respect of complainant's **personal knowledge** of the matters therein set forth, and in respect of the **sources for complainant's belief** that a crime had been committed."

The Tenth Circuit, without reference to the arguments summarized above, held:

> "The filing of such complaint, when made by the examining agent and affirmatively stating that the complaint is based upon his personal investigation, effectively tolls the statute under the proviso of Section 6531. . . ." 321 F. 2d at 715.

We are constrained to observe additionally that if **Giordenello** is to be accorded the broad meaning and application contended for by appellant, then the result could conceivably be the elimination entirely of the filing of complaints by agents of the Internal Revenue Service who have conducted an investigation of the liability of a taxpayer. As stated by Judge Duncan, supra, 226 F. Supp. at 758, "If an Internal Revenue agent may not be permitted to make an affidavit based upon information obtained by him from an examination of a taxpayer's per-

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trial court, and consequently the Tenth Circuit did not discuss it, apparently thinking the issue waived.

Although the complaint does not appear in the reported opinion in *Sansoverino*, a true copy of such complaint was filed with the district court here and appears as a part of the original files. The complaint is similar, although perhaps not quite as complete, as the one before us.

sonal books and records, . . . [we] do not see how he could ever make an affidavit sufficient to obtain a warrant." We do not believe such result was intended; certainly it would not be desirable, and is not necessary to protect the constitutional rights of the alleged offender.

The trial court properly held that the complaint tolled the statute of limitations. The judgment of conviction is

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

(Filed Jun. 16, 1964, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,566. September Term, 1963.

Max Jaben, Appellant,

vs.

United States of America.

Appeal From the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Max Jaben, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

June 16, 1964.

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit.

No. 17,566. September Term, 1963.

Max Jaben,	Appellant,	Appeal from the United States District Court for the Western District of Missouri.
vs.		
United States of America.		

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 9, 1964.